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March 22, 2023
*Commission on
State Mandates*



***COMMISSION ON STATE MANDATES:
HEARING ON PROPOSED DECISION
Order No. R8-2009-0030, Test Claim 09-TC-03***

Bryan K. Brown, Meyers Nave LLP
On Behalf of Alameda Countywide Clean Water Program

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A Professional Law Corporation



March 24, 2023

“New Program” Under Section 6

“New Program” Under Section 6

The Proposed Decision's finding is in direct conflict with the Third District's recent decision in *Department of Finance v. Comm'n on State Mandates* (2022) 85 Cal.App.5th 535, 581-82, relating to San Diego County stormwater permit requirements. There, the State made the same argument made in the Proposed Decision:

The State argues that even if the permit conditions mandate a program, the program is not new. As required by the Clean Water Act, this permit and permittees' two prior permits required permittees to prohibit non-stormwater discharges into their MS4s and to reduce the discharge of pollutants in stormwater from MS4s to the maximum extent practicable. (33 U.S.C. § 1342 (p)(3)(B)(ii), (iii).) New permit conditions did not change that obligation. The State claims that a condition that did not appear in prior permits or has been updated to require additional expenditures is not new because it does not increase permittees' underlying obligation to eliminate or reduce the discharge of pollutants from their MS4s to the maximum extent practicable. Rather, the condition ensures compliance with the same standard that has applied since 1990 when permittees obtained their first permit.

“New Program” Under Section 6

The Court in the San Diego County stormwater case REJECTED this argument:

The application of Section 6, however, does not turn on whether the underlying obligation to abate pollution remains the same. It applies if any executive order, which each permit is, required permittees to provide a new program or a higher level of existing services. (Gov. Code, § 17514.) Exercising its discretionary authority with each permit, the State imposed specific conditions it found were necessary in order for permittees to satisfy the maximum extent practicable standard. If those conditions required permittees to provide a new program or to increase services in an existing program, they triggered Section 6.

To determine whether a program imposed by the permit is new, we compare the legal requirements imposed by the new permit with those in effect before the new permit became effective. (See *San Diego Unified, supra*, 33 Cal.4th at p. 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.) This is so even though the conditions were designed to satisfy the same standard of performance.

“New Program” Under Section 6

The Proposed Decision makes the same arguments rejected by the Court.

Proposed Decision at p. 20:

Moreover, meeting water quality standards for metals, organochlorine compounds, selenium, and pesticides is not new to the claimants; narrative and numeric criteria or objectives existed in the Basin Plan and the CTR before the TMDLs were adopted⁷¹ and compliance with those standards was expressly required under the prior permit by performing the same activities as required by the test claim permit. The prior permit:

- Required that discharges from the MS4 shall not cause or contribute to exceedances of receiving water quality standards (designated beneficial uses and water quality objectives).⁷²
- Prohibited illegal and illicit non-stormwater discharges from entering into the MS4.⁷³

“New Program” Under Section 6

The Proposed Decision makes the same arguments rejected by the Court. For example, the Proposed Decision points to a prohibition against non-stormwater discharges that are in the CWA. Proposed Decision at p 20:

- Prohibited illegal and illicit non-stormwater discharges from entering into the MS4.⁷³

Clean Water Act § 404(p)(3)(B)(ii):

(3) PERMIT REQUIREMENTS

(B) Municipal discharge

Permits for discharges from municipal storm sewers -

(i) may be issued on a system- or jurisdiction-wide basis;

Proposed Decision →

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

2022 San Diego Court of Appeal Decision →

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

“New Program” Under Section 6

The Proposed Decision makes the same arguments rejected by the Court. For example, the Proposed Decision points to a prohibition against “contributing to exceedance of receiving water quality standard” which is in every permit and stems from a general underlying pollution abatement requirement. Proposed Decision at p. 20:

- Required that discharges from the MS4 shall not cause or contribute to exceedances of receiving water quality standards (designated beneficial uses and water quality objectives).⁷²

Test Claim Permit:

IV. RECEIVING WATER LIMITATIONS

1. Discharges from the MS4s shall not cause or contribute to exceedances of receiving water quality standards (designated beneficial uses and water quality objectives) for surface waters or groundwaters.

2002 Permit:

IV. RECEIVING WATER LIMITATIONS

1. Discharges from the MS4s shall not cause or contribute to exceedances of receiving water quality standards (designated beneficial uses and water quality objectives) for surface waters or groundwaters.

“New Program” Under Section 6

The Proposed Decision acknowledges the applicable TMDLs were not yet adopted and included in the prior permit:

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Moreover, meeting water quality standards for metals, organochlorine compounds, selenium, and pesticides is not new to the claimants; narrative and numeric criteria or objectives existed in the Basin Plan and the CTR before the TMDLs were adopted⁷¹ and compliance with those standards was expressly required under the prior permit by performing the same activities as required by the test claim permit. The prior permit:

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As explained in the Findings of the test claim permit, these waterbodies were listed under section 303(d) as impaired since these constituents exceeded applicable State water quality standards. One of the listed causes of the impairment was urban runoff.⁵⁰¹ Federal law requires that TMDLs be established for each 303(d) listed waterbody for each of the pollutants causing impairment.⁵⁰² In 2002, U.S. EPA adopted TMDLs for the region’s waterbodies with respect to metals, organochlorine compounds, selenium, and pesticides in Newport Bay and San Diego Creek, and the test claim permit implements those TMDLs. In addition, the Regional Board was in the process of developing its own TMDLs to replace the U.S. EPA TMDLs, and the test claim permit imposes requirements related to that transition. The test claim permit also implements the 1999 TMDL for fecal coliform in San Diego Creek and Newport Bay, and implements 2007

“New Program” Under Section 6

Even if TMDLs did exist, they are not self-executing:

City of Arcadia v. U.S. Environmental Protection Agency (2003) 265 F.Supp.2d 1142,1144

3. Implementation of TMDLs

TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing.  *Pronsolino v. Nastro*, 291 F.3d 1123, 1129 (9th Cir.2002) (“TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans.”) (citing  *Alaska Ctr. for the Env’t v. Browner*, 20 F.3d 981, 984–85 (9th Cir.1994)). A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. See, e.g.,  *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir.2002) (“Each

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 23, 2023, I served the:

- **Interested Person's PowerPoint Presentation for the Commission's March 24, 2023 Hearing filed March 22, 2023**

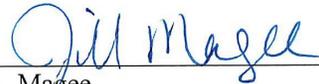
*California Regional Water Quality Control Board, Santa Ana Region,
Order No. R8-2009-0030, Sections IX, X, XI, XII, XIII, and, XVIII, Adopted
May 22, 2009, 09-TC-03*

Santa Ana Regional Water Quality Control Board, Resolution No. R8-2009-0030,
adopted May 22, 2009

County of Orange, Orange County Flood Control District; and the Cities of Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Huntington Beach, Irvine, Lake Forest, Newport Beach, Placentia, Seal Beach, and Villa Park, Claimants

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 23, 2023 at Sacramento, California.



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Last Updated: 3/9/23

Claim Number: 09-TC-03

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City of Buena Park
City of Costa Mesa
City of Cypress
City of Fountain Valley
City of Fullerton
City of Huntington Beach
City of Irvine
City of Lake Forest
City of Newport Beach
City of Placentia
City of Seal Beach
City of Villa Park
County of Orange
Orange County Flood Control District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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